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IN THE

SUPREME COURT OF THE UNITED STATES

73-1520 TERM, 1974

No. A-744

BERNICE THOMAS,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Mississippi

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INDEX

	Page
Prayer	1
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Reasons for Granting the Writ	7
Argument	7
Appendix A—Opinion of the Supreme Court of Mississippi	A-1
Appendix B—Indictment	A-10

Cases Cited

Griffin v. California, 380 U.S. 609 (1965)	7, 8
Miranda v. Arizona, 384 U.S. 436 (1966)	7, 8
Stewart v. United States, 366 U.S. 2 (1961)	8

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STATE OF MISSISSIPPI,
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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Mississippi

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi, entered on November 12, 1972, affirming petitioner's conviction of grand larceny by the Circuit Court of Warren County, Mississippi.

OPINION BELOW

The opinion of the Supreme Court of Mississippi affirming the judgment of the Circuit Court is reported at 285 So.2d 148 (Miss. 1973). It is set out in the Appendix, *infra*, pp. A-1-A-9.

JURISDICTION

The judgment of the Supreme Court was entered on November 12, 1973. By order dated February 6, 1974, Mr. Justice Powell extended the time to file this petition to and including April 11, 1974. This Court has jurisdiction under 28 U.S.C. 1257(3).

QUESTION PRESENTED

1. Whether the due process and Fifth Amendment rights of petitioner were violated by the prosecution's questions to petitioner concerning her pre-trial silence and by the prosecution's argument to the jury commenting on her pre-trial silence.

STATEMENT OF THE CASE

Petitioner was indicted, along with four other people, for grand larceny, at the July 1972 term of the Warren County Grand Jury (App., *infra*, p. A-10).

At petitioner's trial the jury heard the following testimony:

Joyce Jones, the store manager of Jitney Jungle No. 2, testified that on May 13, 1973, eight hundred and ninety-seven dollars was stolen from cash register No. 1 of the store. (R. 20-21, 47). Witness Jones did not know of the theft until after it occurred (R. 21).

Shirley Dement, a cashier, testified that on the day of the robbery, four women entered the store together (R. 59-60). One of the women, whom she identified as petitioner, asked her to help locate some lemon ammonia. Ms. Dement left her checking stand to look for the product but was unable to find the lemon ammonia because the store was sold out. As De-

ment started toward the front, petitioner stopped her and asked if Lemon Joy would do the same thing. After telling petitioner that it would not, petitioner asked if the store had Knox Gelatin. Witness Dement returned to the front and asked the Assistant Manager to assist petitioner in locating the gelatin (R. 60). Petitioner purchased the gelatin (R. 62), and shortly after the four women left, the theft of the money was discovered (R. 63).

Shirley McDuff, also a cashier, testified that on the day of the theft she was assigned to the register from which the money was taken (R. 79-80). She stepped away from her register about noon and upon returning about five or ten minutes later, found her register was almost empty (R. 80).

Willie Nicholson, Jr., the bag boy, testified that he saw the four women enter and leave the store (R. 105). He gave the sheriff a description of the people, including the man who was driving, and of their car (R. 109). Later, he identified the petitioner at the jail (R. 110).

V. P. Martin, a highway patrolman, testified that after receiving a description of the car and occupants (R. 116), he noticed a similar car which he stopped (R. 117). He searched the car but found nothing (R. 120). The sheriff and a deputy arrived and after advising the people of their rights, placed them under arrest (R. 120).

The sheriff then told the people he was going to search them, whereupon, one of the women, Harriet Cannon, pulled the money from her brassiere (R. 121). The patrolman identified the petitioner as one of the four women then present (R. 121-3).

The sheriff testified that he checked the serial numbers of the money taken from one of the four women with the serial numbers given to him by the store manager of some of the stolen bills (R. 144-45). He and a deputy both testified that the women claimed that the money had been made while the

four of them worked as prostitutes in New Orleans (R. 144, 157).

The petitioner took the stand in her own behalf and testified that she worked as a night manager of a motel at Tougaloo, Mississippi (R. 161). On the day in question, a friend called her and asked if she would like to get a drink (R. 162). When her friend came to pick her up, Johnny Chapman was driving and two other women in uniforms were in the automobile (R. 163). They then drove to Rankin County and to Vicksburg where they decided to stop at the Jitney Jungle because Chapman wanted some cigarettes (R. 165). Petitioner testified that she got out of the car with the others and went into the store because she wanted to get some lemon ammonia to clean with (R. 165). She looked for it but could not find any so she asked the clerk, who was standing in the aisle (R. 165). The clerk told her the store did not have any. After the two of them started up the aisle, petitioner testified that she saw the lemon-colored bottles and asked the clerk "would this do the same?" (R. 165). The clerk told her that those bottles contained dish washing liquid (R. 165). Petitioner then inquired about the gelatin and was told it was on another aisle (R. 165). The woman asked one of the men to assist petitioner, who, after being shown where it was, purchased the gelatin (R. 165-66). She then rejoined the others in the car (R. 166). After they drove off, Chapman requested that someone else drive, so petitioner took the wheel (R. 166-67). After she began driving, she saw a patrolman behind her and pulled over (R. 167). She heard some scuffling in the back and heard Chapman say something about some money (R. 167). She testified that after they were arrested and taken to jail, the sheriff asked them where the money came from. Harriet Cannon told him they had made the money prostituting in New Orleans (R. 168). The sheriff then asked if that was what they all said, and she nodded her head because she was afraid of what the others might do to her and because she did not want to say anything until she

could get an attorney (R. 168-69, 176). Petitioner testified that she knew nothing about the money being taken until she was arrested (R. 170).

On cross-examination, the prosecutor asked the petitioner the following questions concerning her direct testimony:

> Q. Now, how come you made a claim to that nine hundred and fourteen dollars as being a prostitute?
>
> A. Cause I didn't know, up until the man told me where it came from, I didn't know what kind of trouble I was in; so I went along with the group until I could get somebody to give me some assistance, some legal assistance.
>
> Q. Of course, you didn't tell any of the law enforcement officers until you got on the witness stand, did you?
>
> By Mr. Thames: We object to the form of the question because, of course, that's her constitutional right not to.
>
> By the Court: Well, I'll overrule the objection.
>
> (Mr. Ellis resumes examination of witness.)
>
> Q. And you didn't tell this until you got on the witness stand to any of the law enforcement officers, did you?
>
> A. No, sir.
>
> By Mr. Thames: We renew our objection that on the grounds that under the Constitution a Defendant's silence cannot be held against her, and the form of the question and implications flowing therefrom violates the constitutional right to remain silent prior to trial.
>
> By the Court: Well, the objection will be overruled.
>
> (Mr. Ellis resumes examination of witness.)
>
> Q. All right. You answered, "No." You answered that you didn't, just a few moments ago, is that right?
>
> A. Yes. (R. 176-77).

During his closing argument, the prosecutor made the following statement:

> Remember that the Defendant said while she was in jail that she had an interest in the stolen money. That statement of hers has gone undenied since May when this thing happened. The Grand Jury met in July and she did not come out and change her story or deny the truth of it. She has been indicted since then, and still she has not changed that story she told in the jail and has remained quiet about the story being false until yesterday when she took the stand here in this Court room. (R. 205).

Defense attorney objected to the statement as violative of petitioner's constitutional right against self-incrimination and her right to be secure from any comment on her exercise of her right to be silent prior to trial. (R. 205). The trial judge then observed that he had overruled objections to similar testimony the previous day and overruled petitioner's objection and request for a mistrial. (R. 206).

Petitioner was convicted of grand larceny and sentenced to four years in the Mississippi State Penitentiary. (R. 193).

On appeal to the Mississippi Supreme Court, petitioner's conviction was affirmed. The court held that

> [t]he cross-examination of the appellant by the State, after she had voluntarily taken the stand in her own defense and after she had admitted her previous statement was untrue and after she had attempted to explain it away, was legitimate cross-examination, and not a comment on her pretrial silence (App., *infra*, p. A-7).

REASONS FOR GRANTING THE WRIT

The Mississippi Supreme Court in this case has decided a federal question of substance in a way which is probably not in accord with applicable decisions of this Court.

ARGUMENT

Griffin v. California, 380 U.S. 609 (1965), held that it was reversible error for the prosecutor to comment on the failure of the defendant to take the stand in his own behalf. This Court said that comment on the exercise of the right not to testify "is a penalty for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." **Griffin v. California,** *supra,* at 614. In **Miranda v. Arizona,** 384 U.S. 436, 445 (1966), this Court held that in exercising Fifth Amendment rights a defendant could at any stage of the questioning process stop the questioning to consult with an attorney. As this Court said,

> [t]he mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

The Court went on to say that in accord with the **Miranda** decision,

> it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. 384 U.S. at 468, n. 37.

Petitioner submits that the questions and comments by the prosecution as to why petitioner had not altered her former prior inconsistent statement made at arrest until the day of trial clearly constitute a penalty on her exercise of her right to remain silent and are not proper impeachment as the Mississippi Supreme Court held. This Court in **Stewart v. United States,** 366 U.S. 2 (1961), reversed a conviction where cross-examination of the defendant at his third trial disclosed that he had failed to take the stand at his two former trials.

Petitioner submits that in light of the decisions of this Court in **Stewart, Griffin** and **Miranda,** the holding the Mississippi Supreme Court is erroneous and that her conviction should be reversed.

Respectfully submitted

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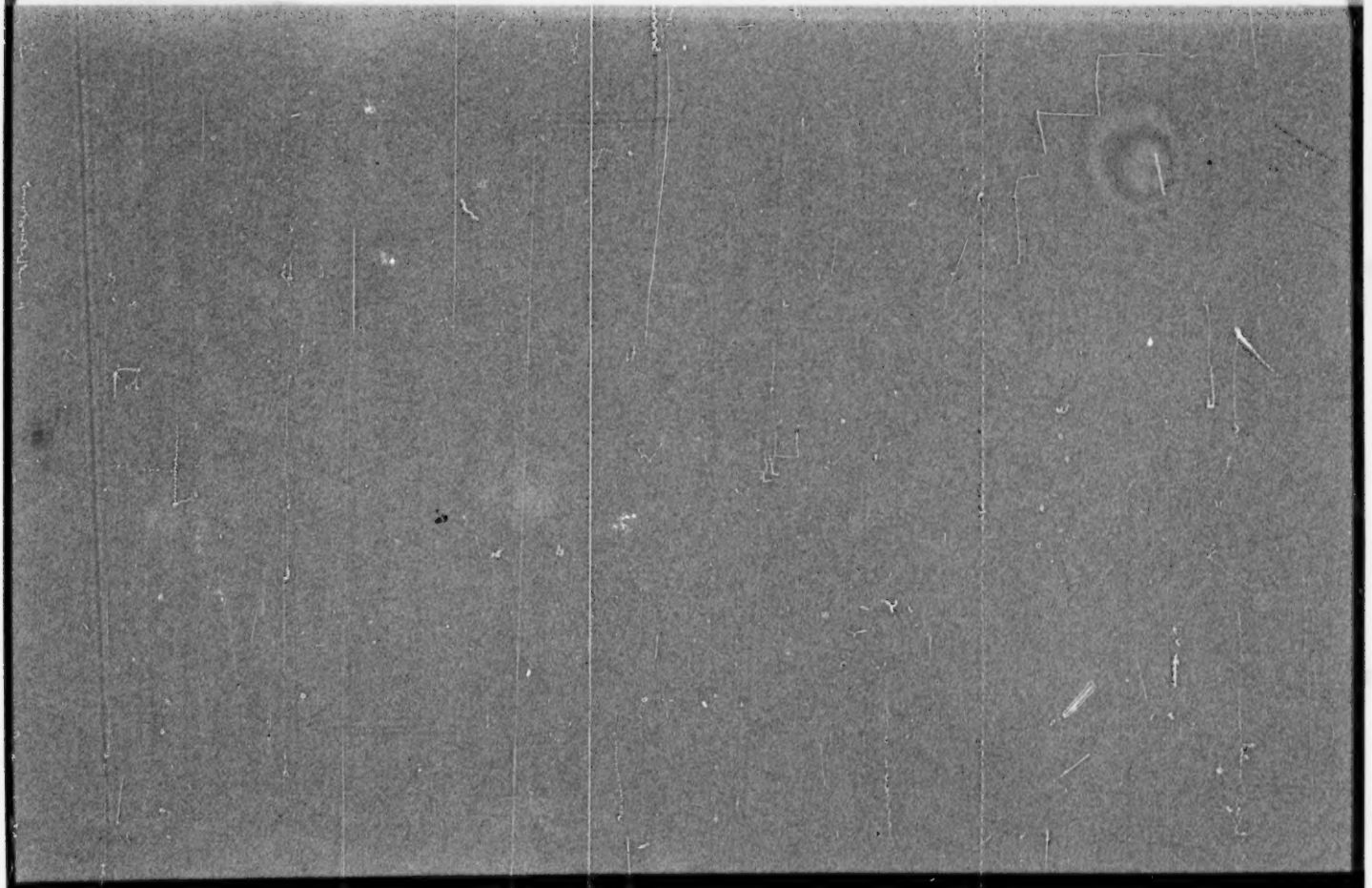

APPENDIX A

Bernice Thomas

v.

State of Mississippi

No. 47495.

Supreme Court of Mississippi

Nov. 12, 1973.

Defendant was convicted in the Circuit Court, Warren County, Ben Guider, J., of grand larceny and she appealed. The Supreme Court, Robertson, J., held that, under circumstances, extrajudicial identification of defendant at jail by bag boy as being one of four women in store at time of robbery was pure surplusage and harmless error, that, although district attorney should not have commented that coindictees had been held accountable, where trial judge sustained objection and admonished district attorney to refrain from any comment as to disposition of cases against codefendants, such admonition was, to all intents and purposes, an instruction to jury to disregard remarks and trial judge was correct in overruling motion for mistrial.

Affirmed.

1. **Criminal Law Key 1169.2(2)**

Where defendant in answer to question by her own counsel freely admitted that she had arrived in car with others, was in robbed store and left in car with others, and two cashiers at

store, deputy sheriff and sheriff all positively identified defendant after proper predicate had been laid, allowing store's bag boy to testify about an extrajudicial identification of defendant by him at county jail was harmless error.

2. Criminal Law Key 730(1)

Although district attorney should not have commented that coindictees had been held accountable, where trial judge sustained defendant's objection and admonished district attorney that defendant had been granted a severance and to refrain from any comment as to disposition of cases against codefendants, such admonition was, in effect instruction to jury to disregard remarks and trial judge was correct in overruling motion for mistrial.

Ramsey, Bodron & Thames, Vicksburg for appellant.

A. F. Summer, Atty. Gen., by Karen Gilfoy, Sp. Asst. Atty. Gen., Jackson, for appellee.

Robertson, Justice:

Bernice Thomas, the Appellant, was jointly indicted with Johnny L. Chapman, Harriett Cannon, Bobbie Nell Hughes and Edna E. Robinson for grand larceny. A severance was granted and Bernice Thomas was tried at the November, 1972, term of the Circuit Court of Warren County. The jury returned a verdict of guilty, and appellant was sentenced to serve a term of four years in the Mississippi State Penitentiary.

About Noon, Saturday, May 13, 1972 four black women, two of whom were dressed in white uniforms, one in an aqua green uniform and one in a yellow uniform, entered Jitney Jungle No. 2 on U.S. Highway 61, south of Vicksburg, Mississippi.

There were three checkout stands at the front of this supermarket. The appellant inquired of Shirley Dement, the cashier at cash register No. 2, as to the location of lemon ammonia. Mrs. Dement left her checkout stand and walked down an aisle with the appellant. There was no lemon ammonia on the shelf.

As Mrs. Dement turned to go back to her cash register, appellant inquired as to whether lemon Joy was the same as lemon ammonia, and after Mrs. Dement explained the difference, appellant asked about Knox gelatin. Mrs. Dement asked the assistant manager to show appellant where the Knox gelatin was, and she returned to her checkout stand.

Appellant bought a box of Knox gelatin at checkout stand No. 3 operated by Helen McKenzie. During this entire time checkout stand No. 1 was unattended, Shirley McDuff, the operator, having gone to the back of the store. When she returned to her checkout stand, she immediately discovered that about $900.00 had been taken from cash register No. 1.

Willie Nicholson, Jr., a 19-year-old bag boy for the store, had noticed the four uniformed women when they entered and when they left. All four had left in a two-tone green Plymouth Fury, with a Rankin County license tag and driven by a black male.

The store manager telephoned the sheriff of Warren County and gave him a description of the car, the four women and the driver. The sheriff dispatched his deputy, Ed Reed, to Jitney Jungle No. 2 to get further details about the theft. In the meantime, Sheriff Barrett put out a description of the car and the occupants over the police radio.

A short time later, the Mississippi Highway Patrol advised Sheriff Barrett that Patrolman Martin had stopped a car fitting the description and occupied by four uniformed women and one

man on Interstate No. 20 just east of Clinton. Sheriff Barrett, Deputy Reed and Mrs. Shirley Dement arrived at the stopped Plymouth Fury a short time later, and Mrs. Dement immediately identified the four uniformed women as being the four who were in Jitney Jungle No. 2.

Under questioning by Sheriff Barrett, Harriett Cannon, one of the four uniformed women, took out a wad of bills from her brassiere. The money was immediately counted and the total was $914. The serial numbers of a five dollar bill, a ten dollar bill and a twenty dollar bill placed in cash register No. 1 that Saturday morning had been recorded by the store manager, Joyce Jones, and these marked bills were found in the $914.00 recovered when it was recounted at the Warren County jail.

The four women, including the appellant, and Johnny Chapman, the only male, were taken to the Warren County jail. Harriett Cannon there told Sheriff Barrett that the money belonged to all of them and that they had made it as prostitutes in New Orleans. Sheriff Barrett asked each, including the appellant, if that were true, and the appellant testified that she and the others all nodded their heads.

Bernice Thomas contends that Harriett Cannon had the money, that she (Bernice) knew nothing about the plan to rob, did not aid or assist Harriett Cannon, and just happened to be in the getaway car before and after the robbery, just happened to be in the store when it was robbed, and that it was just a case of guilt by association.

The only assignments of error that we need notice are:

1. It was error to allow Willie Nicholson, Jr. to testify about an extrajudicial identification of appellant by him at the Warren County jail;

2. It was error to permit the county attorney to comment on the pretrial silence of the defendant in his argument to the

jury, and in failing to grant defendant's motion for a mistrial because thereof; and

3. The trial court erred in failing to instruct the jury to disregard the comments made by the district attorney in his closing argument when he told the jury that those persons who had been indicted with Defendant but who had been tried separately had all been held accountable for their actions and Defendant should be held accountable for hers, and that it was error for the court to overrule the defendant's motion for a mistrial.

At the trial, Shirley Dement testified that the appellant was the one who had inquired of her about lemon ammonia, lemon Joy, and Knox gelatin, and that she was facing her during most of this time. Mrs. Dement's identification of appellant was based on her observation of her in the store. Helen McKenzie positively identified the appellant as the one who purchased a box of Knox gelatin for 30 cents at her checkout stand.

V. P. Martin, Mississippi Highway Patrol, testified that the appellant was driving the Plymouth Fury at the time he stopped it for speeding on Interstate 20, and that he gave her a traffic ticket for speeding. Appellant was also identified by Sheriff Barrett and Deputy Sheriff Reed.

In fact, the appellant herself took the stand and, under questioning by her own counsel, freely admitted she was the one who had inquired about the lemon ammonia, lemon Joy and Knox gelatin; that she was the one who had purchased a box of Knox gelatin in Jitney Jungle No. 2; that she was the one driving the car at the time it was stopped by the highway patrolman for speeding; that she did agree when questioned at the Warren County jail that they had made the money as prostitutes in New Orleans. Appellant further testified under questioning by her own attorney:

> "Q. What happened then when you got to the jail in Vicksburg?

"A. Well, as the sheriff was asking us our names and everything, he asked us where the money come from. So Harriet told him we had got the money from prostituting in New Orleans, and the story about we caught a bus and all of this. So he said something to the effect, 'Is that what all you all have to say?' So we all nodded our heads.

"Q. Is that where the money came from?

"A. No, sir.

"Q. Had you all been prostituting in New Orleans?

"A. No, sir.

"Q. Did you come up by bus?

"A. No, sir.

"Q. Do you know where the money came from?

"A. I do now.

"Q. Did you then?

"A. No, sir, I didn't.

"Q. Why did you then make that statement?

"A. Because, I really—I didn't know what I had got myself into. And I figured I had better stick with what the crowd said. I didn't know what any of them would do to me if I would squak, or you know, just—give any kind of statement at all. I didn't say anything until I could get to my lawyer or somebody that could tell me something. I shouldn't have said anything at all. I shouldn't have even nodded my head now."

Appellant admitted that she was picked up in Jackson by Johnny Chapman, Edna Robinson and the others about 8:30 that morning.

[1] All that Willie Nicholson, Jr. said about the appellant was that she arrived in the car with the others, was in the

Jitney Jungle and left in the car with the others. There was no issue about this. Appellant freely admitted all of this under questioning by her own counsel. In addition, Shirley Dement, Helen McKenzie, Deputy Sheriff Ed Reed and Sheriff Paul Barrett all positively identified her after proper predicate had been laid. So the extrajudicial identification of the appellant at the trial by Willie Nicholson, Jr., as being one of the four women in the Jitney Jungle, was pure surplusage and harmless error.

The cross-examination of the appellant by the State, after she had voluntarily taken the stand in her own defense and after she had admitted that her previous statement was untrue and after she had attempted to explain it away, was legitimate cross-examination, and not a comment on her pretrial silence.

The closing arguments were not taken down and transcribed, but the remarks of the district attorney objected to by the appellant were expressed in this way in the bill of exceptions:

"Bernice Thomas is in this with all the rest of them. They were working together to steal this money. They had an agreement between each other. Don't let her break her contract with the others. They are all in it together and should each be held accountable. Make the Defendant accountable like Johnny Chapman, the driver, has already been made accountable and like Edna Robinson and Bobbie Nell Hughes has been made to account for their actions."

The bill of exceptions then recites:

"Whereupon Counsel for Defendant objected to the comments made by the District Attorney on the grounds that such comments violated her due process rights and equal protection of the laws granted under the United States Constitution; that such statements violated the spirit as well as the law dealing with severances, which have been granted to all the Defendants

indicted for this alleged offense; that it gives the Jury information about the disposition of other cases which disposition is not in the record and was inflammatory and highly prejudicial. At the time that this objection was made, the Defendant also made a Motion for a mistrial.

"Whereupon the Trial Court sustained the objection to the comments and admonished the District Attorney not to make additional comments about the others who were jointly indicted or the disposition of their cases; but the Trial Court overruled the Defense Motion for a mistrial."

The trial judge appended to the bill of exceptions an explanation of why he ruled as he did on the closing remarks of the district attorney and the motion for mistrial. Over his signature, the trial judge said:

> "As regards that portion of the Bill of Exceptions attributing certain language to the District Attorney, it is readily apparent from the 'Answer to Proposed Bill of Exceptions' that a dispute exists as to exactly what was said. Since the Court felt that State counsel was getting close to a possible comment upon the disposition of charges as to other Defendants, *the Court sustained the objection and admonished the District Attorney that the Defendant on trial had been granted a severance, as was her right, and to refrain from any comment as to any disposition of cases against the co-defendants.* However, the Court declined to grant the Motion for Mistrial.
>
> "All in all, the case was vigorously prosecuted, and equally vigorously defended. Counsel for Defendant had strenuously argued that responsibility for the theft belonged solely to Harriett Cannon, a co-defendant who had jumped bail, explicit attention to which was called by defense counsel. The District Attorney countered by arguing for the guilt of all. The jury was well equipped with the facts, the case having been fully developed, and regardless of

which of the two versions is the accurate one, the Court did not, and does not, feel that a Mistrial was justified. It seems to the Court that the State's argument was directed to the principle as announced by the Supreme Court in the very recent case of Shows v. State, 267 So.2d 811 (Oct. 16, 1972), to the effect:

" 'The appellant was a principal in the crime of armed robbery. He was positively identified as one of the three actively engaged in the robbery. All three acted jointly and in concert; each was responsible and accountable for the wrongful actions of the other two. ([Ivey v. State], 232 So.2d at 369).' "

[2] The District Attorney should not have commented that the co-indictees had been held accountable, but the trial judge, in putting these remarks in context, sheds light on the court's ruling. The trial judge sustained the defendant's objection to the remarks of the district attorney and admonished the district attorney "that the Defendant on trial had been granted a severance, as was her right, and to refrain from any comment as to any disposition of cases against the co-defendants." The appellant did not ask the trial judge to instruct the jury to disregard the remarks of the district attorney and not to consider those remarks in arriving at a verdict, as a defendant usually does. Be that as it may, we think that his admonition to the district attorney was, to all intents and purposes, an instruction to the jury to disregard his remarks and not to consider them in arriving at their verdict. Under the peculiar circumstances and posture of this case, we think that the trial judge was correct in overruling the motion for a mistrial.

The conviction and sentence are affirmed.

Affirmed.

Rodgers, P. J., and Smith, Sugg and Broom, JJ., concur.

APPENDIX B

Report of Indictment

And afterwards, to-wit: On the 3rd day of July, 1972, the same being a day of the regular July Term, the following entry was made on the Minutes of the Circuit Court in Minute Book "A-8", on page 265, as follows, to-wit:

The Grand Jurors of the State of Mississippi elected, summoned, empaneled, sworn and charged to inquire in and for the body of Warren County, came into Court attended by their proper officer, there being eighteen of their number present, and upon their oath and through their foreman presented to the Court nine (9) True Bills of Indictment, which were endorsed "A True Bill" and the same so signed were presented to the Court and filed by the Clerk with his endorsement of filing thereon and numbered as follows, to-wit: 7540, 7541, 7542, 7543, 7544, 7545, 7546, 7547 and 7548.

The indictment number 7548 is the indictment against the defendant herein, and is in the words and figures as follows, to-wit:

Circuit Court

July Term, 1972

State of Mississippi
County of Warren

The Grand Jurors of the State of Mississippi, elected, summoned, empaneled, sworn and charged to inquire in and for the body of Warren County, State of Mississippi, at the term aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present that Johnny L. Chapman, Harriett

Cannon, Bobbie Nell Hughes, Edna E. Robinson, and Bernice Thomas late of the County aforesaid, on or before the 3rd day of July, A. D., 1972, with force and arms, in the County aforesaid, and within the jurisdiction of this Court did wilfully, unlawfully and feloniously take, steal and carry away certain personal property of another, to-wit, the sum of $914.00 in money, of the value of $914.00 in lawful money of the United States, then and there the money, funds and personal property of Jitney Jungle No. 2 of Vicksburg, Inc., a corporation, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

/s/ John E. Ellis
District Attorney

within writ endorsed on back as follows:

No. 7548

The State

vs.

Johnny L. Chapman, Harriet
Cannon, Bobbie Nell Hughes,
Edna E. Robinson & Bernice Thomas

Grand Larceny

No Prosecutor

Witnesses:

Ed Reed

A True Bill

/s/ W. G. Shockley
Foreman of Grand Jury

Filed this the 3rd day of July, 1972

J. Noel Nutt, Circuit Clerk

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1520

BERNICE THOMAS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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INDEX

Opinion Below 1

Jurisdiction 1

Question Presented 2

Statement of the Case 2

Reasons for Denying the Writ 8

Argument 8

Conclusion 10

Certificate 10

Cases Cited

Griffin v. *California*, 380 U.S. 609 (1965) 8

Grunewald v. *United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957) 9

United States v. *Pledger*, 409 F.2d 1335 (5th Cir. 1969) 9

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1520

BERNICE THOMAS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi (Petitioner's Appendix A) is reported as *Thomas* v. *State*, 285 So.2d 148 (Miss. 1973).

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the due process and Fifth Amendment rights of petitioner were violated by certain questions propounded by the prosecutor during his cross-examination and statements made by the District Attorney during his final argument which petitioner urges constituted an impermissible comment on her pre-trial silence.

STATEMENT OF THE CASE

Petitioner was jointly indicted along with four other persons for the crime of grand larceny. A severance was granted, and petitioner was tried, convicted and sentenced to serve a term of four years in the Mississippi State Penitentiary. (Tr. 198)

Shortly before noon on Saturday, May 13, 1974, four women attired in uniforms of various colors entered a supermarket known as Jitney Jungle No. 2 located on U.S. Highway 61, South of Vicksburg, Mississippi. Three grocery checkout stands, each with a cash register, are located near the front of this store. The employee assigned to cash stand No. 1 was in the rear of the store at the time (Tr. 80) and the employee on duty at cash stand No. 3 was checking groceries. (Tr. 59)

Shirley Dement was the cashier at check stand No. 2 and saw petitioner and her three companions enter the store. She identified petitioner in the courtroom as the woman who asked her assistance in locating a product known as lemon ammonia. Mrs. Dement left her register in order to locate the product only to learn none was available. Petitioner then asked about another cleanser as an alternative and then asked for some gelatin whereupon

Mrs. Dement returned to the front of the store and noticed one of the other uniformed women standing near check stand No. 2. Thinking this customer wished to be waited on, Mrs. Dement asked the assistant store manager to assist petitioner in locating the gelatin for petitioner which she subsequently purchased at check stand No. 3.

Petitioner and her three companions were in the supermarket approximately five minutes and shortly thereafter, the employee at check stand No. 1 returned and discovered all the five, ten and twenty dollar bills had been removed from the cash register. (Tr. 80, 81) This she reported to the store manager. (Tr. 21)

Joyce Jones, the manager, testified she had put the money in each of the three cash registers early on the morning of the day in question at which time she recorded the serial numbers of a twenty dollar bill, a ten dollar bill and a five dollar bill and then placed these recorded bills on the bottom of each stack of bills in the separated compartments of the cash register at check stand No. 1. (Tr. 25)

Upon being told of the missing money, Mrs. Jones immediately notified the sheriff who sent a deputy to the scene to talk to the witnesses and employees, one of whom was Willie Nicholson, Jr., a nineteen year old bag boy for the grocery, who had observed the four women when they entered the store and when they left. He noted and reported to the investigating officer that the women had left in a two-tone green Plymouth Fury automobile bearing a Rankin County license tag and driven by a black male. (Tr. 109, 110)

This description was given by the sheriff to the Highway Patrol and pursuant to a radio dispatch of this information, a highway patrolman saw a speeding vehicle fitting the exact description he had received over his radio. He

pulled the vehicle over, advised the five subjects of their rights and detained them until the sheriff arrived accompanied by Mrs. Dement who immediately identified the four women, one of whom was petitioner, as the ones who had been in the supermarket. (Tr. 142)

The sheriff advised the five subjects of their rights under *Miranda*, placed them under arrest and informed them they would be searched at which time one of the women, Harriett Cannon, removed a roll of bills totalling nine hundred and fourteen dollars from her brassiere. (Tr. 143) It was later determined the serial numbers of a five dollar bill, a ten dollar bill and a twenty dollar bill included in the money handed over by Cannon matched the serial numbers of the bills which the store manager had recorded prior to placing the money in the cash register before the start of the business day. (Tr. 33)

Petitioner, her three female companions and Johnny Chapman, the only male, were taken to the county jail. Harriett Cannon told the sheriff the four women had made the money by working as prostitutes in New Orleans. Deputy Sheriff Reed testified, "[S]he (Cannon) said they had all made this money in New Orleans. And the other three was present when she was making this statement. They agreed that this were all their money, nine hundred and fourteen dollars." (Tr. 152, 157, 159)

Petitioner took the stand and testified she knew nothing of a plan to rob the supermarket and only entered the store in order to purchase a cleaning product which she intended to use at the motel where she was employed. (Tr. 165) She denied doing anything to aid or assist in the robbery. (Tr. 174, 175)

Petitioner stated that after the group left the supermarket they headed towards Jackson and at one point Johnny Chapman, the driver, ". . . said the jump-suit he

was wearing, he said, 'I'm tired. Somebody come on and drive. This thing is bothering me.' Or something to that effect. He said the jump-suit was worrying him. So he said, 'who have a license?' I said, 'I have a driver's license.' So he said, 'Come on and drive awhile.' I was sitting in the back. I got in the front and drove, and he got in the back." (Tr. 183) The jump suit was then stuffed under the car seat. (Tr. 168)

When asked on direct examination why she had agreed with the story that the money had been made by prostituting in New Orleans, petitioner replied, "[b]ecause I really—I didn't know what I had got myself into. And I figured I had better stick with what the crowd said. I didn't know what any of them would do to me if I would squak, or, you know, just—give any kind of statement at all. I didn't say anything until I could get to my lawyer or somebody that could tell me something. I shouldn't have said anything at all. I shouldn't have even nodded my head now." (Tr. 169)

On cross-examination, the following colloquy occurred:

> Q. Now, how come you made a claim to that nine hundred and fourteen dollars as being a prostitute?
>
> A. Cause I didn't know, up until the man told me where it came from, I didn't know what kind of trouble I was in; so I went along with the group until I could get somebody to give me some assistance, some legal assistance.
>
> Q. Of course, you didn't tell any of the law enforcement officers until you got on the witness stand, did you?
>
> By Mr. Thames: We object to the form of the question because, of course, that's her constitutional right not to.

By the Court: Well, I'll overrule the objection.

(Mr. Ellis resumes examination of witness.)

Q. And you didn't tell this until you got on the witness stand to any of the law enforcement officers, did you?

A. No, sir.

By Mr. Thames: We renew our objection that on the grounds that under the Constitution a Defendant's silence cannot be held against her, and the form of the question and implications flowing therefrom violates the constitutional right to remain silent prior to trial.

By the Court: Well, the objection will be overruled.

(Mr. Ellis resumes examination of witness.)

Q. All right. You answered, "No." You answered, that you didn't, just a few moments ago, is that right?

A. Yes. (Tr. 176-177)

After petitioner was convicted and sentenced, a Bill of Exceptions was signed by the trial judge. In the pertinent part of that Bill of Exceptions the following statement was attributed to the prosecutor during his final argument:

> Remember that the Defendant said while she was in jail that she had an interest in the stolen money. That statement of hers has gone undenied since May when this thing happened. The Grand Jury met in July and she did not come out and change her story or deny the truth of it. She has been indicted since then, and still she has not changed that story she told in the jail and has remained quiet about the story being false until yesterday when she took the stand here in this Court room. (Tr. 205)

Objection by the defense was interposed on grounds such a statement constituted a violation of the "Constitutional right of the Defendant to be secure from having any comment made about her silence and being a violation of her other Constitutional right protecting her self-incrimination and from not having to make any statements on the merits of her case until her trial." (Tr. 205) The objection of the Defendant was overruled and the motion for a mistrial was denied. (Tr. 206)

In his ruling on the Bill of Exceptions the trial judge held:

> In passing upon this Bill of Exceptions tendered by Counsel for Defendant, as to the statement attributed to the County Attorney the Court concluded that State counsel was merely pointing up an inconsistency between the statement made by Defendant to law officers at time of arrest and that made by her on the witness stand, which has been often held to be entirely proper. It did not constitute any violation of her constitutional right to remain silent, since she had volunteered the statement, nor did it constitute a comment on her failure to testify,—since she did actually take the stand and testify. (Tr. 207)

On appeal to the Mississippi Supreme Court petitioner's conviction was affirmed. Addressing the specific issue now presented to this Court the Supreme Court of Mississippi held:

> [t]he cross-examination of the appellant by the State, after she had voluntarily taken the stand in her own defense and after she had admitted her previous statement was untrue and after she had attempted to explain it away, was legitimate cross-examination, and not a comment on her pretrial silence. (Petitioner's Appendix A, p. A-7)

REASONS FOR DENYING THE WRIT

No question of substance is presented by petitioner's assertion that her right to pre-trial silence was violated when the prosecutor pointed out the inconsistency of petitioner's volunteered claim of joint ownership of the money which she made at the time of her arrest and her subsequent denial of any knowledge of the money as she later testified about at her trial.

Furthermore, the opinion of the Mississippi Supreme Court is not at variance with the applicable decisions of this Court.

ARGUMENT

It is the position of respondent that the three cases relied upon in support of petitioner's contention have absolutely no applicability to the facts now reviewed.

Certainly the scope of the privilege against self-incrimination was expounded in *Griffin* v. *California*, 380 U.S. 609 (1965), when this Court declared that the privilege barred any potentially adverse comment by either the Court or the prosecutor in the event a defendant failed to take the stand. However, in the instant case, petitioner voluntarily took the stand in her defense and on direct examination readily admitted that the story she told the sheriff was false, that the women had not made the money by engaging in prostitution and that she had only gone along with that version until she could secure a lawyer. (Tr. 168, 169) The fact remains that version was not contradicted until she did so herself when she took the stand.

On cross-examination, the prosecutor questioned petitioner about the explanation offered the officer at the time

of her arrest and her subsequent testimony at trial in which she denied any knowledge of or participation in the robbery. In *Grunewald* v. *United States*, 353 U.S. 391 (1957), it was held:

> It is, of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness. But this can be done only if the judge is satisfied that the prior statements are in fact inconsistent. (1 L.Ed.2d 931 at 951)

Again, it is emphasized that here petitioner, under questioning by her own attorney, freely admitted the falsity of her original version told to officer when she was arrested.

The Fifth Circuit case of *United States* v. *Pledger*, 409 F.2d 1335 (5th Cir. 1969), citing *Grunewald*, supra, held:

> When an accused testifies voluntarily he waives his privilege against self incrimination, and his failure to deny or explain evidence against him, which he might naturally explain is open to adverse inference. (409 F.2d at 1336)

Petitioner seems to suggest that her right to remain silent also cloaked her with a co-equal right not to have the jury know of prior inconsistent statements which were not altered until she took the stand and first admitted their falsity under questioning by her own attorney. Respondent submits no such privilege was available to her then nor is it now.

CONCLUSION

Respondent respectfully submits that the petition for writ of certiorari should be denied and that the judgment of the Mississippi Supreme Court be affirmed.

Respectfully submitted,

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CERTIFICATE

I, Karen Gilfoy, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Mississippi, to William Sebastian Moore, 514 Barnett Building, Jackson, Mississippi 39201, Attorney for Petitioner.

This the 19th day of June, A.D., 1974.

KAREN GILFOY
Special Assistant Attorney General